



Supreme Court of Georgia
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CASES DUE FOR ORAL ARGUMENT

Summaries of Facts and Issues

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Wednesday, September 11, 2019

10:00 A.M. Session

DELOACH V. THE STATE (S19A1299) and THE STATE V. DELOACH (S19X1300)

These related appeals stem from two separate murders. Following an August 2017 trial, **Arheem "Heem" Deloach** was convicted in **Chatham County** of the April 2015 murder of Rashad Biggins and the June 2015 murder of Jamell Law. Deloach was sentenced to two consecutive life sentences plus five years in prison. His new attorney filed a motion requesting a new trial, and following a hearing, on April 22, 2019, the trial court granted the motion for new trial as to the counts involving victim Biggins, but it denied the motion for new trial as to the counts involving victim Law. Deloach now appeals the denial of the motion for new trial regarding Law, while in a cross-appeal, the State appeals the granting of the motion for new trial regarding Biggins. Details of both murders are provided in briefs.

ARGUMENTS (S19A1299): Deloach's sole argument is that he received "ineffective assistance of counsel" from his trial attorney in violation of his constitutional rights. His trial attorney was ineffective for failing to file a motion asking the court to sever the counts regarding the murder of Biggins from the counts regarding the murder of Law. "In this case, the only thing in common between the death of Rashad Biggins and the death of Jamell Law is that Deloach was charged with murder as to both," Deloach's appellate attorney argues in briefs. "Prior to the State obtaining the indictment this case was tried on, the two deaths were separately indicted."

The trial attorney also provided ineffective assistance of counsel by failing to object or move for a mistrial when the judge, while instructing the jury prior to its deliberations, referred to appellate review of the case by telling the jury, “because I’d get reversed probably.” In its 1979 decision in *Price v. State*, the Georgia Court of Appeals stated that, “The Supreme Court has repeatedly held references should not be made to the reviewing courts by court or counsel except to cite their decisions.” The “reviewing courts” in Georgia are the state Court of Appeals, which is the intermediate appellate court, and the state Supreme Court, which is the highest court in Georgia.

The State, represented by the District Attorney’s and Attorney General’s offices, argue that Deloach’s trial attorney rendered effective assistance “and there is no basis for reversal.” Deloach’s attorney “reasonably elected not to seek a severance of the charges,” the State argues in briefs. The trial court properly found that his trial attorney had a “tactical reason” for not seeking a severance. As to the judge’s statement that “I’d get reversed probably,” the State argues that Deloach’s argument his trial attorney was ineffective for failing to object to the statement “lacks merit, particularly when the remarks are viewed in context.” The trial attorney later testified that he did not object to the judge’s comments because he “saw nothing wrong with what the judge was saying.” The judge found that the trial attorney was not ineffective for failing to object because the statement did not “amount to an inference about the weight of any evidence or a suggestion of incriminating information.”

ARGUMENTS (\$19X1300): In the cross-appeal, the State argues the trial court improperly granted Deloach a retrial in the murder of Rashad Biggins. Key to the State’s case were incriminating statements Deloach had allegedly made to Trishon Collins while both were in the county jail together. During his opening statement, the State’s prosecutor told the jury that a detective had interviewed Collins, who claimed that Deloach confessed to murdering Biggins. “First, the State disclosed all negotiations and deals with Trishon Collins to [Deloach] in open court and on the record on May 31, 2016,” the State argues. “Second, the trial court erred in finding that a ‘plea agreement was offered to Mr. Collins by the State on charges pending at the time of Mr. Collins’s cooperation with the police which provided for his agreement to testify about defendant.’ The record clearly shows that Collins was not offered a deal *at the time* of his cooperation with police.” Rather, he cooperated with police prior to being offered a plea deal. At the time Deloach shot and killed Jamell Law, the murder of Rashad Biggins remained unsolved. The indictment listing the murder of Law was set for trial on March 28, 2016. Prior to trial, an inmate at the Chatham County Detention center, Trishon Collins, came forward with information about the murder of Rashad Biggins. Collins gave a recorded interview to a detective prior to the State even having been notified of Collins’s existence, the State contends. Prosecutors discussed Collins’s pending charges and agreed that if Collins cooperated in the Biggins case, Collins could receive a reduction in his sentence. “This fact was disclosed to Appellee [i.e. Deloach] in open court on May 31, 2016,” the State argues. The State subsequently re-indicted Deloach for both murders. The State had no contact with Collins prior to his interview with the detective. No misleading information was intentionally presented to the jury, the State contends. At the hearing on Deloach’s motion requesting a new trial, his attorney argued that the prosecutor committed misconduct by failing to correct Collins’s testimony that he had not received a deal in exchange for his testimony. “Even assuming *arguendo* that prosecutorial misconduct unintentionally occurred during the trial, any such misconduct was harmless,” the State argues. Even without

Collins's statement to the detective prior to any deal being made, there was overwhelming evidence of Deloach's guilt, the State contends. The evidence showed that Deloach was in possession of both weapons used in the Biggins murder at times close in proximity to that murder. Also Deloach was able to establish a motive for the murder of Biggins: Biggins had previously shot Deloach.

Deloach's attorney argues the trial court was correct to grant a new trial in the Biggins murder. "The prosecutor engaged in misconduct in allowing Trishon Collins's false testimony of never being offered a deal in regards to his testimony to go uncorrected," the attorney argues. Collins was in jail on unrelated drug charges when he met Deloach, and during his opening statement, the prosecutor told the jury that the detective had interviewed Collins who claimed Deloach had confessed to the murder of Biggins. Deloach's attorney argues that "what we have here is not simply an issue regarding disclosure of a deal with one of its witnesses, but the act of expressly claiming there was no deal, when Trishon Collins had been given a deal." The prosecutor specifically asked Collins at trial, "Because you're not getting a deal now, are you?" to which Collins replied, "Never was." "However, there was a deal," Deloach's attorney argues. "But trial counsel had no knowledge of the deal until asked about it at the hearing on the motion for new trial."

Attorney for Deloach: Steven Sparger

Attorneys for State: Meg Heap, District Attorney, Matthew Breedon, Asst. D.A., Christopher Carr, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., Katherine Emerson, Asst. A.G.

GASTON V. THE STATE (S19A1284)

A man is appealing his murder conviction and life prison sentence for shooting to death another man in southwest Atlanta.

FACTS: One evening in the fall of 2011, **Lorenzo Gaston** solicited sex from Maegan Bostic, a prostitute. Bostic agreed to the liaison, and the two drove to an apartment complex where some acquaintances lived. Once they arrived, Bostic asked Gaston to use a condom, but he refused. She then demanded that he drive her back to the Travelodge where she was staying. When they got back to the motel, Bostic told her then-boyfriend, Terrance "Red" Walker, what had happened. Walker demanded that Gaston pay Bostic some money for her time. Gaston refused and threatened to "shoot the place up," although Bostic told Walker that Gaston did not even have a gun. Suddenly a group of people at the motel began shooting at Gaston and his Ford F-150. Gaston wrecked his vehicle while trying to escape, fleeing across the highway on foot.

On Nov. 2, 2011, Walker's mother drove him to "The Hagos"—an apartment complex in **Fulton County** where his brother was staying. The Hagos is a high-crime area, where Gaston routinely sold drugs. According to defense attorneys, Bostic later told police that Walker was a rival drug dealer. Gaston, who was parked across the street at the time, followed Walker and his mother into the complex in a black car. Shortly after Walker got out of his mother's vehicle, Gaston drove back out of the complex. A short time later, while Walker was standing in a grassy area between some apartments, Gaston and another individual approached Walker from behind. The pair began shooting at Walker, striking him four times – once in the back of each thigh, in his left hip, and in his head. Walker died at the scene. No weapons were found on or near his body, although a cell phone and ear buds were found in his left hand. In addition, a .40 caliber

projectile was found in his clothing, and a .38 caliber lead bullet was found in his head. At the crime scene, law enforcement found four .40 caliber shell casings and one 9mm shell casing. Later at trial, evidence was introduced that Gaston had been known to carry both a .40 caliber and a 9mm handgun. Several months after the shooting, Bostic ran into Gaston at a gas station. She said at trial that he “looked at me, and it was like, ‘I got him, and you next.’”

” Later at trial, Gaston’s ex-girlfriend, Jaquita Mack, testified that shortly after the incident, she overheard Gaston admit to killing Walker.

In March 2012, Gaston was indicted for malice murder, felony murder based on aggravated assault, two counts of aggravated assault, and possession of a firearm during the commission of a felony. Following a jury trial in October 2016, Gaston was found not guilty of malice murder but guilty of all the remaining counts. At trial, he did not testify, and his attorney presented no other evidence in his defense. Gaston was sentenced to life in prison plus five years on the weapons count. Gaston now appeals to the Georgia Supreme Court.

ARGUMENTS: Gaston’s appeal attorneys argue his trial attorney rendered “ineffective assistance of counsel” in violation of Gaston’s constitutional rights. “Here, trial counsel performed inadequately. His client received no opening argument, had no witnesses called, and saw many aspects of the State’s case go unchallenged. These were not deliberate choices,” Gaston’s appeal attorneys argue in briefs. Here, “trial counsel testified that there was no evidence to support a self-defense charge, even though there was ample evidence. He claimed it would have been ‘unethical’ to request it. He attempted to object to the admission of text messages, but either raised the wrong grounds or failed to renew his objection when the time came. Because trial counsel cannot invoke strategy to defend mistakes of law, he was deficient. And because his mistakes touched on each of the best pieces of evidence against Lorenzo Gaston, his deficiency prejudiced his client.” The appeal attorneys argue that specifically Gaston’s trial attorney failed in four ways: He failed to request that the judge instruct the jury about the law regarding self-defense; he failed to object to the State’s impermissible closing argument in which the prosecutor referred to evidence that was not in the record; he failed to object to Jaquita Mack’s prior statement to police that implicated Gaston as it should have been excluded under the law; and he failed to introduce evidence that a witness initially denied seeing Gaston shoot the victim. “Gaston was not entitled to a perfect trial,” his attorneys argue. “Nor a perfect lawyer. But he deserved the chance to be represented by someone who could provide adequate representation. This was not it.”

The State, represented by the District Attorney’s and Attorney General’s offices, argues that “Appellant [i.e. Gaston] raises no legal error in his appeal, instead presenting four separate claims that he received ineffective assistance of counsel at trial. However, none of these decisions can support a claim sufficient to warrant the reversal of the trial court or the grant of a new trial.” “Appellant has the burden to overcome this presumption and to show *affirmatively* that the purported deficiencies in counsel’s performance were indicative of ineffectiveness and not examples of a conscious, deliberate trial strategy.” Gaston’s trial attorney was not ineffective for choosing not to request a jury instruction on self-defense. “Because Appellant has failed to affirmatively show that no reasonable attorney would avoid a justification defense under the facts of this case, his argument is without merit,” the State argues. One reason the trial attorney did not pursue such a defense “is that Appellant himself never mentioned self-defense to trial counsel (or presumably, anyone at all) in any of their conversations about the case.” The trial

attorney also was not ineffective for opting not to object during the State's closing argument. He was not ineffective for failing to object to the contents of a text message the State introduced as having been sent by witness Jaquita Mack. And the trial attorney was not ineffective for not cross-examining another witness about one of the statements she made during an initial police interview. Gaston's arguments are "without merit, and this Court should therefore affirm the trial court's order," the State contends.

Attorneys for Appellant (Gaston): Andrew Fleischman, Noah Pines

Attorneys for Appellee (State): Paul Howard, Jr., District Attorney, Lyndsey Rudder, Dep. D.A., F. McDonald Wakeford, Asst. D.A., Christopher Carr, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., Matthew O'Brien, Asst. A.G.

HILL ET AL. V. MOODY ET AL. (S18G1436)

In this pre-trial appeal, lawyers who were sued by a client for legal malpractice are appealing a Georgia Court of Appeals decision. The Court of Appeals ruled that under the attorney-client privilege, the lawyers are not entitled to the records of another law firm that had also represented the client, but whom the client did not sue. At issue in this case is whether a client who sues an attorney for malpractice and thereby waives the attorney-client privilege also waives the attorney-client privilege regarding a third party attorney the client has engaged but not sued.

FACTS: Daryl Moody and three business entities he controlled (UAS Investments, LLC, Mast Nine, Inc., and Leucadia Investment Holdings, Inc.) filed a legal malpractice lawsuit against his former lawyers, Douglas Kertscher, Robert Joseph, and their law firm, **Hill, Kertscher & Wharton, LLP**. According to the complaint, in January and February 2015, Moody and UAS Investments hired the Hill lawyers to provide legal advice and services regarding their ongoing investments and transactions with a California-based aerospace company. Based on the lawyers' advice, Moody took measures to oust the company's president, Robert Miller, and filed suit in Georgia against him and the company. As a result, the ousted president sued Moody and the business entities in California. In April 2015, Moody engaged the law firm of Holland & Knight to assist with the Georgia and California litigation. Holland & Knight's limited representation of Moody ended in November 2015. In April 2017, Moody and the companies filed their lawsuit against the Hill lawyers. In the complaint, Moody said he and the companies were sued in California based on the Hill lawyers' advice. Moody also complained that the lawyers had failed to disclose their prior representation of Miller and the aerospace company. Moody did not sue Holland & Knight, but as part of the discovery process, the Hill lawyers requested Holland & Knight's litigation files for both the Georgia and California lawsuits, as well as all correspondence, reports, memos, notes, and research regarding the Hill lawyers. Moody then sought a protective order in **Cobb County** State Court on the grounds that the requested materials were protected by both the attorney-client privilege and the work-product privilege. (The attorney-client privilege protects the confidentiality of

communications between a client and attorney.) The trial court found that Holland & Knight and the Hill lawyers together had represented Moody in the litigation. The trial court ruled that by suing the Hill lawyers, Moody and the business entities had waived any attorney-client privilege or work-product privilege not only in regard to the Hill lawyers, but also in regard to Holland & Knight. The trial court therefore denied Moody's motion for protective order.

Moody then appealed to the Georgia Court of Appeals, the state's intermediate appellate court. The Court of Appeals reversed the trial court's ruling, finding that the attorney-client privilege was not waived as to Holland & Knight, because that law firm was not sued and because it was retained after the alleged malpractice was committed. Kertscher, Joseph, and their law firm, Hill, Kertscher & Wharton, LLP, now appeal to the Georgia Supreme Court.

ARGUMENTS: Attorneys for the Hill lawyers argue that Georgia law has long held that clients waive the attorney-client privilege when they put legal advice at issue by suing their lawyers. Referring to Holland & Knight as "co-counsel," the attorneys argue that at issue in this case is "whether Georgia will follow the majority rule, well-supported by Georgia legal principles, which allows lawyers in a legal malpractice case to discover communications between their co-counsel and the legal malpractice plaintiff," i.e. Moody et al. The Hill lawyers ask the Supreme Court to reverse the Court of Appeals ruling, "adopt the majority rule, and hold that when a legal malpractice plaintiff sues some of the lawyers but not all, the attorney-client privilege does not protect communications between the plaintiff and the other lawyers. The Court of Appeals erred, attorneys for the Hill lawyers argue, by not adopting the majority rule and by finding no implied waiver of the attorney-client privilege. Moody hired two sets of lawyers in this case, and their participation overlapped. "The fundamental deficiency in the lower court's judgment is that it avoids a distinction that most courts recognize as material – a difference in how the attorney-client privilege operates in single-counsel representations versus multi-firm representation," the attorneys argue. "Consequently, the Court of Appeals erred when it applied this Court's single counsel case law to a multi-counsel problem." This case involves "third-party discovery of co-counsel communications with a mutual client." The client chose to sue the Hill lawyers but not their co-counsel. The Court of Appeals ruling that absent a lawsuit against Holland & Knight, the attorney-client privilege barred inquiry into that firm's advice to Moody "contradicts this Court's precedent and the robust preponderance of rules governing waiver in other jurisdictions. Before the Court of Appeals decision, Georgia followed a nationwide majority rule based on a local federal court precedent," the attorneys argue. "This rule – making relevant co-counsel communications discoverable in legal malpractice cases – promotes a full vetting of claims, particularly the requirement that a defendant's legal advice must be the proximate cause of harm to a client." "The general law of privilege provides the right rule – when a client waives the privilege against disclosure of its communications with

counsel, the privilege is waived as to all communications on the same subject matter, regardless of the number of lawyers involved in a case," attorneys for the Hill lawyers contend.

Moody's attorneys argue the Court of Appeals made the right decision and this Court should uphold it. The Hill lawyers have blurred the facts and skewed the timeline of Holland & Knight's role in the litigation, the attorneys argue. As the record shows, Holland & Knight was engaged "post transaction" of the malpractice acts of the Hill lawyers, and there is no basis for finding an implied waiver of the attorney-client privilege between the Hill lawyers and the non-party Holland and Knight. Despite the Hill lawyers' "best attempts to frame it differently, the record shows that this is a successor counsel case," as opposed to a co-counsel case, "with respect to the timeframe giving rise to the malpractice by Hill, Kertscher & Wharton, LLP," Moody's attorneys argue. Here, the trial court incorrectly found that Holland & Knight "represented plaintiff Moody in connection with matters which are the subject of plaintiffs' claims in this case." Moody hired Holland & Knight some four months after the Hill lawyers rendered their advice. The trial court misapplied law, which appropriately protects the attorney-client privilege, the attorneys argue. "Adopting a broad sweeping rule waiving the attorney-client privilege and work product protections as proposed by Appellants [i.e. Hill lawyers] has far-reaching negative effects, potentially chilling candid conversations with not only lawyers but also other professionals."

Attorneys for Appellants (Hill): Johannes Kingma, John Rogers, Mark Rogers

Attorneys for Appellees (Moody): Douglas Chandler, Shaun Rooney